CORRECTED COPY

Office - Supreme Court, U.S.
FILED
SEP 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2005

In the Supreme Court of the United States

OCTOBER TERM, 1984

BERTRAM ZWEIBON, ET AL., PETITIONERS

v.

JOHN N. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
LARRY L. GREGG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

2788

QUESTIONS PRESENTED

1. Whether respondent violated "clearly established" legal standards when, as Attorney General, he authorized warrantless national security wiretaps in 1970 and 1971, prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

2. Whether warrantless national security wiretaps conducted in 1970 and 1971 violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, and if so, (a) whether a judicial decision of first impression construing the Act to impose such liability should be given retroactive effect and (b) whether a defense of qualified immunity should be allowed.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions involved 2

Statement 4

Discussion 12

Conclusion 19

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Burkhart v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) 16

Chevron Oil Co. v. *Huson*, 404 U.S. 97 ..... 7, 17

Davis v. *Scherer*, No. 83-490 (June 28, 1984) 15

Forsyth v. *Kleindienst*, 551 F. Supp. 1247, aff'd and appeal dismissed, 729 F.2d 267 15

Harlow v. *Fitzgerald*, 457 U.S. 800 ..... 10, 12, 13, 15, 16

Katz v. *United States*, 389 U.S. 347 ..... 12, 13, 14

Kissinger v. *Halperin*, 452 U.S. 713 8

Sinclair v. *Kleindienst*, 645 F.2d 1080 ..... 10, 12

United States v. *Stone*, 350 F. Supp. 75 14

United States v. *United States District Court*, 407 U.s. 297 ..... *passim*

Page

Cases—Continued:

Weinberg v. *Mitchell*, 588 F.2d 275 8

Wood v. *Stirckland*, 420 U.S. 308 ..... 6, 12

Constitution and statutes:

U.S. Const.:

Art. II 16
Amend. IV 2, 4, 6, 7, 8, 17

Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797 2

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.* 4, 17, 18

18 U.S.C. (1976 ed.) 2511(3) 2
18 U.S.C. 2520 ..... 3, 7

42 U.S.C. 1983 4

42 U.S.C. 1985 4

47 U.S.C. (1964 ed.) 605 14

Miscellaneous:

S. Rep. 1097, 90th Cong., 2d Sess. (1968) 18

S. Rep. 94-755, 94th Cong., 2d Sess. Bk. III (1976) 13

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2005

BERTRAM ZWEIBON, ET AL., PETITIONERS

v.

JOHN N. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 720 F.2d 162 (*Zweibon IV*).[1] The opinion of the district court (Pet. App. 29a-34a) is unreported. The original opinion of the district court ruling that the surveillance challenged in this suit was constitutionally authorized is reported at 363 F. Supp. 936 (1973). This judgment was reversed by the court of appeals in an opinion reported at 516 F.2d 594 (1975), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*). On remand, the district court struck the petitioners' jury demand as untimely, but this was reversed by the court of appeals on a petition for a writ of mandamus in an opinion reported at 565 F.2d 742 (1977) (*Zweibon II*). In

---

[1]Petitioners' reproduction of the court of appeals' opinion does not reflect the court's November 30, 1983 sua sponte amendment (App., *infra*, 1a-2a).

an opinion reported at 444 F. Supp. 1296 (1978), the district court again granted summary judgment for the defendants, this time on the ground that the court of appeals' rulings in *Zweibon I* should not be applied retroactively for civil damages purposes. This was reversed in part and affirmed in part by the court of appeals in an opinion reported at 606 F.2d 1172 (1979), cert. denied, 453 U.S. 912 (1981) (*Zweibon III*).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1983, and a petition for rehearing was denied on January 9, 1984 (Pet. App. 35a). On March 28, 1984, the Chief Justice extended the time to file a petition for a writ of certiorari until June 7, 1984 (Pet. App. 36a). The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. (1976 ed.) 2511(3)[2] provided, in pertinent part:

---

[2]18 U.S.C. (1976 ed.) 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which establishes procedures for the conduct of electronic surveillance for national security purposes, was enacted seven years after the events that gave rise to this litigation.

Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

3. 18 U.S.C. 2520 provides:

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT

1. Petitioners (16 members of the Jewish Defense League) (JDL) instituted this action on October 7, 1971, in the United States District Court for the District of Columbia against then Attorney General John N. Mitchell and nine Special Agents of the Federal Bureau of Investigation. The suit followed disclosure by the government that conversations of certain defendants and counsel had been overheard during an electronic surveillance of telephones in the JDL offices in New York City. The electronic surveillance was conducted from October 1, 1970, through October 31, 1970, and again from January 5, 1971, through June 30, 1971. The surveillance had been authorized by Attorney General Mitchell, acting pursuant to the President's authority to conduct surveillance for national security purposes. Petitioners sought money damages, claiming that the surveillance violated the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, and 42 U.S.C. 1983 and 1985.

On cross-motions for summary judgment based on affidavits and exhibits, the district court entered judgment for the defendants (363 F. Supp. at 936). The court found that respondent had authorized the surveillance only after determining that "the activities of the JDL were obviously detrimental to the continued peaceful relations between the United States and the Soviet Union and threatened the President's ability and constitutional authority to conduct

the foreign relations of this country" (363 F. Supp. at 942). The court noted that respondent, in authorizing the surveillances, had "relied on the total knowledge received from the Department of State and the National Security Council and from meetings with the Director of the FBI" (*id.* at 939). Moreover, the court found that numerous factors had influenced the Attorney General's judgment. The court concluded that the surveillance initially had been authorized for a 30-day period because of a concern that foreign diplomats would be attacked by the JDL during the 25th anniversary session of the General Assembly of the United Nations, which was to commence in October 1970 (*id.* at 938). For several months prior to this, JDL actions against Soviet personnel and facilities had prompted strong protests by the Soviet Union, which had warned that the JDL's activities could adversely affect continued cooperation between the United States and the Soviet Union in ongoing diplomatic efforts. These warnings also contained thinly veiled threats of possible retaliation against United States diplomats and embassy personnel in Moscow. *Id.* at 939-940. The reauthorization of the JDL surveillance in January 1971 occurred after the JDL took responsibility for an explosion at an Aeroflot-Intourist office, which immediately prompted additional protests from the Soviet Union (*id.* at 938-939, 940-941). These protests, and the consequent deterioration in United States-Soviet diplomatic relations, continued with petitioner Meir Kahane's announced intention to have JDL teams harass Soviet diplomats and with the bombing of an Amtorg office on April 22, 1971 (*id.* at 941-942).

In all, the district court found over 20 instances in which these concerns had been expressed by the State Department, the United States Mission to the United Nations, and

the United States Ambassador to the Soviet Union. The district court concluded that the facts "show[ed] a clear threat to this country's foreign relations"; that "[t]he electronic surveillances were installed * * * under the constitutional authority of the President over the conduct of foreign relations and his inherent power to protect our national security"; and that prior judicial authorization for the surveillances was thus not required by the Fourth Amendment (363 F. Supp. at 943-944). Additionally, the district court held that petitioners' statutory claim under Title III must fail because in *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972) [hereinafter cited as *Keith*], this Court had held that " 'the Act * * * simply did not legislate with respect to national security surveillances' " (363 F. Supp. at 943).

2. The court of appeals, sitting en banc, reversed. 516 F.2d 594 (1975). The court held that prior judicial authorization was required by the Fourth Amendment for foreign security surveillances unless the target of the surveillance was himself an agent of, or a collaborator with, a foreign power. *Id.* at 614 (plurality opinion); *id.* at 689 (Wilkey, J., concurring in part). A plurality of the court also held that the Court's opinion in *Keith* "offers only ambiguous guidance" with respect to the statutory question (516 F.2d at 660). Finding that "strong policy considerations" favored Title III's application, the court held that Congress intended the statute's reach to be "contingent upon further judicial pronouncements concerning the constitutional question reserved in *Katz* * * *" (*id.* at 667, 671). The court concluded, however, that in determining the extent of the defendants' liability for authorizing and conducting a warrantless national security surveillance, the qualified immunity defense enunciated in *Wood* v. *Strickland*, 420 U.S. 308 (1975), as well as the good faith defense provided under

Title III itself (18 U.S.C. 2520), should be considered on remand. 516 F.2d at 670.[3]

3. After discovery was completed on remand, the district court granted respondent's renewed motion for summary judgment.[4] Relying on this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 104 (1971), the district court held that the court of appeals' conclusion that a warrant was required by the Fourth Amendment in national security surveillance constituted a new principle of law that should not be applied retroactively to create personal damages liability (444 F. Supp. at 1299-1301). The district court noted that the lawfulness of warrantless surveillances prompted by foreign security concerns consistently had been upheld by the lower courts prior to the decision of the court of appeals in *Zweibon I* and that the purpose of furthering the protections of the Fourth Amendment would not be advanced by retroactive creation of damages liability in these circumstances (444 F. Supp. at 1299-1300). The court also observed that creation of a private damages remedy for actions that were not recognized to be unlawful when done might constitute an unconstitutional ex post facto imposition of liability (*id.* at 1301). Finally, the court concluded that these same concerns barred petitioners' claims for relief under Title III (*id.* at 1301 & n.5).

4. The court of appeals again reversed the district court's judgment (606 F.2d at 1172). The court of appeals held that the decisions in *Keith* and *Zweibon I* should be applied

---

[3]Petitioners petitioned for a writ of certiorari to obtain review of the holding in *Zweibon I* that the defendants could raise a good-faith, qualified immunity defense under Title III. Respondent then filed a conditional cross-petition challenging the portions of *Zweibon I* adverse to him. The Court denied the petitions. 425 U.S. 944 (1976).

[4]Petitioners agreed on remand to dismiss their claims against the nine FBI agents. Respondent Mitchell is thus the only remaining defendant in this action.

retroactively for civil damages purposes. The court held that the decisions did not announce a new principle of law but "simply applied the constitutional warrant requirement to national security situations" (606 F.2d at 1179 (footnote omitted)).[5] The court also suggested that an Attorney General who chooses to rely on lower court decisions to guide his action does so at his own risk (*id.* at 1178-1179 & n.37).[6] Moreover, the court reasoned that, on balance, the equities favor retroactive application of newly announced Fourth Amendment standards in damages actions (*id.* at 1180-181).

With regard to liability under Title III, however, the court of appeals recognized that its prior holding in *Zweibon I* that this statute applies to warrantless national security surveillances "represented the sort of sharp break in the law which should be restricted to prospective effect" (606 F.2d at 1182). Petitions for certiorari were denied following this Court's disposition of *Kissinger* v. *Halperin*, 452 U.S. 713 (1981) (affirming by equally divided Court).

5. On the third remand, respondent initiated interrogatory and document discovery directed at petitioners. Depositions also were noticed, although the court was advised that depositions of all the petitioners might not be required if adequate responses to the other discovery were received. Petitioners subsequently moved to quash the notices of deposition on grounds of relevance and burdensomeness.

---

[5]There is a division within the circuits on this question. See *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978) (holding that *Keith* was not clearly foreshadowed and therefore should not be applied retroactively for damages purposes).

[6]Although the court of appeals reasoned that "[c]ontradictory lower court rulings might not establish that a decision was not clearly foreshadowed" for retroactivity purposes, the court noted that "such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes" (606 F.2d at 1181 n.49).

Respondent opposed this on the ground that the petitioners' virtually identical responses to the interrogatories (which in part contradicted a published statement attributed to petitioner Meir Kahane) had made depositions necessary. The court denied petitioners' motion, concluding that they had not shown "good cause" to deny respondent his right to utilize all the discovery tools provided by the Federal Rules of Civil Procedure. At the same time, the court ordered petitioners to propose a satisfactory deposition schedule, since petitioners had contended that respondent's proposed schedule was too burdensome. Although they had twice taken respondent's deposition, petitioners responded by advising the district court that they would refuse to obey any court order requiring their own depositions and warning that, unless the court reconsidered, they would " 'take another appeal to the Court of Appeals.' " (Pet. App. 29a-31a).

In light of petitioners' refusal to appear for court-ordered depositions, respondent moved for sanctions. The court granted the motion (Pet. App. 29a-33a). The court first rejected petitioners' burdensomeness argument because "[t]he provisions of the * * * Order [requiring petitioners to propose a schedule] moot [their] argument that the earlier deposition schedule was too intensive; and as a general matter, the Court is not persuaded that a party suffers an unreasonable burden simply because he is required to appear in his chosen forum, at least in the absence of a showing of extraordinary circumstances" (*id.* at 32a). Beyond that, the court noted that "because [petitioners] have made no showing whatever as to the existence of such a burden, the contention is clearly without merit" (*ibid.*). The court also rejected petitioners' relevancy argument, concluding that they could not "avoid discovery by unilaterally framing issues as they would have them, and then contending that the discovery sought cannot be relevant in

the discovery sense to those issues" (*ibid.*). Finally, finding that petitioners' refusal "to attend depositions and give testimony" was "a deliberate decision on their part," the court concluded that sanctions were required (*id.* at 32a-33a). "In view of the unsuitability of any lesser sanction to avoid prejudice to [respondent] and with due regard to the important discovery considerations embodied in Fed. R. Civ. P. 37," the court imposed the sanction of dismissal as "the only course of action that is appropriate" for petitioners' deliberate refusal to obey the court's orders (*id.* at 33a).

5. The court of appeals affirmed the judgment below without reaching the imposition of the sanction of dismissal (Pet. App. 1a-28a). Instead, the court focused on this Court's intervening decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), which modified the standard for qualified immunity. Stating that it "would be remiss in [its] appellate duty were [it] to order yet another remand to resolve what is a purely legal threshold question," the court of appeals concluded that respondent was entitled to qualified immunity because "the illegality of [his] conduct was not 'clearly established' by any reasonable definition of the phrase" (Pet. App. 11a, 13a).

In reaching this conclusion, the court noted that its "task after *Harlow* * * * [was] to measure [respondent's] conduct by reference to clearly established law at the time these wiretaps were authorized" (Pet. App. at 13a). The court followed its decision in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (D.C. Cir. 1981), a damages action against respondent for authorizing the surveillance at issue in *Keith*. The court held that *Sinclair* "control[led] the disposition of this appeal" (Pet. App. 14a-15a) because it had found that there were no clearly established warrant requirements for national security wiretaps prior to *Keith*. The court rejected petitioners' attempt to distinguish *Sinclair*. Petitioners argued that *Sinclair*, which involved electronic surveillance of the

Black Panther Party, was inapplicable because "the JDL [was] a domestic group 'which posed no threat to our own government and did not act in concert with a foreign power' " (Pet. App. 16a (quoting Appellants' Reply Br. 13)). Citing its opinion in *Zweibon I*, the court pointed out that " 'while there is no collaboration between the JDL and Russia —quite the reverse — JDL's activities did involve Russia in a confrontation with the United States. Thus this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition.' " Pet. App. 16a (quoting *Zweibon I*, 516 F.2d at 652). The court of appeals also rejected petitioners' argument that "contemporaneous internal Department of Justice memoranda written for [respondent] demonstrate that [petitioners'] distinctions were 'understood by advisors to this defendant' " (Pet. App. 17a). Such memoranda were "irrelevant after *Harlow*" because they only went to respondent's "subjective good faith, an element now shorn from the defense of qualified immunity" (Pet. App. 17a). The court further concluded that "[its] reading of the internal memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance" (*id.* at 17a-18a). Finally, the court rejected petitioners' attempt to fault respondent because "two lower courts had found warrantless wiretaps to be improper when directed at domestic groups" (*id.* at 18a). The court pointed out that "these two decisions were not the only lower court decisions dealing with the putative national security exemption from the warrant requirement" and that respondent "could reasonably have relied on *other* lower court decisions in which warrantless national security surveillances were held permissible" (*id.* at 19a (emphasis in original)).

Petitioners also challenged the holding in *Sinclair* itself, arguing "that the 'clearly established' test for immunity purposes is coterminous with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect" (Pet. App. 20a). To support their argument, petitioners " 'poll[ed]' the Supreme Court Justices on the scope of the national security exemption as of 1970[,] * * * com[ing] up with six Justices * * * who had indicated their agreement with the proposition *Keith* eventually would establish" (*ibid.*). The court of appeals, however, concluded that petitioners' " 'poll' prove[d] nothing" because "[t]he test for qualified immunity is 'clearly established,' not 'clearly foreshadowed' " (*id.* at 20a-21a). Noting that *Harlow's* standard "is identical to that for establishing the 'objective' element of the old two-pronged test for qualified immunity," the court reasoned that "language [in this Court's decisions construing the old standard] which speaks of 'indisputable law' and 'unquestioned rights' cannot be reconciled with the 'clearly foreshadowed' test." *Id.* at 21a-22a (quoting *Wood* v. *Strickland*, 420 U.S. 308, 321, 322 (1975)). Accordingly, because the distinctions between respondent's "conduct here and that condemned in *Katz* [v. *United States*, 389 U.S. 347 (1967)] or even *Keith* are real and substantial," the court of appeals held that respondent had not violated clearly established law in authorizing the JDL surveillance and, therefore, was "entitled to summary judgment as a matter of law on the question of qualified immunity" (Pet. App. 22a-23a).

DISCUSSION

1. Petitioners assert that review is required here because the court of appeals' decision not only "conflicts with the qualified immunity rule announced by this Court in *Harlow*" but, indeed, has "rendered [that rule] meaningless" (Pet. 14). They argue (*ibid.*) that respondent must be denied

qualified immunity because he violated a "warrant requirement [that] had been established by this Court" and did not accept the views of his subordinates within the Department of Justice as to the scope of the President's national security powers. The difficulty with this argument, as the court of appeals correctly found, is that it ignores the state of electronic surveillance law in 1970-1971 and misconstrues *Harlow*.

Petitioners' error is apparent from their statement that "[t]he warrant requirement had been established by this Court [in *Katz*] and no court had excepted from that requirement wiretaps on domestic organizations that were not attempting to overthrow the government" (Pet. 14). In *Katz*, this Court expressly did not decide whether a warrant was required "in a situation involving the national security" (389 U.S. at 358 n.23). Nor did the Court limit this reservation to some types of national security surveillances but not others.[7] Not until *Keith*, decided more than a year after the JDL surveillance terminated, did this Court distinguish between *types* of national security surveillances and hold that those prompted by purely domestic threats required warrants. Moreover, "[e]ven in *Keith*, [this] Court declined to elaborate on the incidents of 'foreign' versus 'domestic'

---

[7]Historically, national security electronic surveillances most frequently were directed at agents of foreign powers and domestic groups that appeared to threaten the existence and structure of our government. (See cases cited at Pet. App. 19a.) National security concerns do not arise only in these situations, however. For example, leaks of classified military and foreign policy information were found to justify electronic surveillance during both President Kennedy's and President Nixon's administrations. See S. Rep. 94-755, 94th Cong., 2d Sess. Bk. III, at 321-327 (1976). Significantly, petitioners do not argue that the JDL's actions against Soviet personnel and facilities presented no national security concerns. Instead, their argument is a more limited one, *i.e.*, that only certain types of national security surveillances were left undecided by *Katz* and that the JDL surveillance was not among them.

surveillances" (Pet. App. 16a) and, instead, limited its holding to instances where "[t]here was no evidence of any involvement, directly or indirectly, of a foreign power" (407 U.S. at 309 (footnote omitted)). As the court of appeals correctly noted in *Zweibon I* and reiterated in its most recent opinion, because the "JDL's activities did involve Russia in a confrontation with the United States[] * * * this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition." Pet. App. 16a (quoting *Zweibon I*, 516 F.2d at 652). Accordingly, petitioners' argument that respondent violated a warrant requirement that was clearly established by 1970-1971 is totally unfounded. That requirement was not established until the court of appeals' decision four years later in this very case reversed the district court's initial ruling that the surveillance *was* constitutional.[8]

Petitioners' contention that an Attorney General's disagreement with "the advice of his experienced subordinates" is evidence that he has "consciously ignore[d] the commands of the Constitution" (Pet. 15) similarly lacks merit. The Attorney General is not bound to accept the views of subordinates. Rather, as the President's chief legal advisor and head of the Department of Justice, the Attorney General has the ultimate responsibility within the Department for evaluating the scope of the President's constitutional authority. In performing this function, the Attorney General must be free to reject, as well as to accept, the views of his subordinates.

---

[8]Although the court of appeals cited several pre-*Keith* lower court decisions on which respondent "could reasonably have relied" (Pet. App. 19a), petitioners acknowledge only two and attempt to distinguish them as cases involving pre-*Katz* surveillances (Pet. 16 n.3). Such early decisions cannot be ignored, however. Even though pre-*Katz* surveillances were not governed by a warrant requirement, courts still had to address the scope of the President's power in light of the statutory prohibition on interception and divulgence in 47 U.S.C. (1964 ed.) 605. See, *e.g.*, *United States* v. *Stone*, 305 F. Supp. 75, 80-82 (D.D.C. 1969).

Petitioners' argument was properly rejected for additional sound reasons. Aside from the fact that the memoranda on which petitioners rely simply "[did] not purport to declare what was then legally permissible conduct" but rather only "[made] predictions as to future action by [this] Court and discuss[ed] strategic considerations for potential litigation," the court of appeals correctly concluded that the memoranda were "irrelevant after *Harlow*." Pet. App. 18a, 17a.[9] Under *Harlow* (457 U.S. at 818 (footnote omitted)), an official's immunity is not forfeited because of the advice he received but is "measured by reference to clearly established law." In 1970-1971, that law did not require a warrant for surveillances that were authorized in response to either a domestic or foreign threat to the national security. This is sufficient under *Harlow* to protect the respondent from liability, for "[n]o other 'circumstances' are relevant to the issue of qualified immunity." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 7.

2. Petitioners also urge that review is appropriate because "[t]here is a conflict in the Circuits over the extent of Attorney General Mitchell's civil liability for warrantless wiretaps authorized by him in the period prior to the *Keith* decision" (Pet. 16). For this "conflict," petitioners cite the district court's decision in *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247 (E.D.Pa. 1982), aff'd in part and appeal dismissed in part, 729 F.2d 267 (3d Cir. 1984). In *Forsyth*, the district court held that the illegality of domestic national security wiretaps was clearly established in late 1970 and early 1971, approximately a year and one-half before this Court decided *Keith* (551 F. Supp. at 1255-1257). The court

---

[9]None of the memoranda petitioners cite actually addressed the type of foreign security threat that the JDL's actions posed. Moreover, other internal Department of Justice memoranda (including memoranda to respondent and to his predecessors in office) also addressed the electronic surveillance issue (see Appellee's Br. 66 n.55).

of appeals concluded that it lacked jurisdiction to consider the appeal from the denial of respondent's claim of qualified immunity (729 F.2d at 273-274). A strong dissent was registered, which pointed out that "a review of Supreme Court and other federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (*id.* at 280).[10] See also *Burkhart* v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) (illegality of warrantless domestic security wiretaps not clearly established until *Keith*).

Respondent has filed a petition for a writ of certiorari in *Forsyth* (No. 84-335).[11] Among other things, we are requesting that this Court review the question whether the illegality of domestic national security wiretaps was clearly established prior to *Keith*. Because this question is closely related to one of the questions presented in this case, the Court may wish to hold this petition pending disposition of *Forsyth*. However, granting review in the present case does not now appear necessary or appropriate. If this Court does decide Mr. Mitchell's entitlement to qualified immunity in *Forsyth*, that decision will very likely control the present case. If this Court does not grant review in *Forsyth* or does not reach the question of Mr. Mitchell's entitlement to qualified

---

[10]When the surveillance at issue in *Forsyth* occurred, only two federal courts had considered the constitutionality of warrantless domestic national security surveillances. Both courts found them within the President's Article II power, prompting the dissenting judge on the court of appeals to comment: "If anything, [these decisions] suggest * * * that settled law held no warrant was required" (729 F.2d at 278). As a general proposition, it could be said with some force that if federal judges today can disagree on what the law in 1970-1971 required, then the law was not so clearly established as to deny respondent immunity under *Harlow*.

[11]We are serving petitioners in this case with a copy of that petition.

immunity due to jurisdictional obstacles, the Court may then wish to consider the merits of the qualified immunity issue in this case.

3. Petitioners ask this Court to consider two additional issues: whether the court of appeals correctly held in *Zweibon III* (606 F.2d at 1181-1182) that there is no retroactive liability under Title III; and whether the court of appeals correctly held in *Zweibon I* (516 F.2d at 671-673) that the same qualified immunity available as a defense to Fourth Amendment claims would also serve as a defense to Title III claims in the unique situation presented by national security surveillances.

a. The court of appeals in *Zweibon III* correctly recognized that its holding in *Zweibon I* — that Title III applies to warrantless national security surveillance — constituted "the sort of sharp break in the law which should be restricted to prospective effect" (606 F.2d at 1182). In *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-107, this Court held that retroactive application of substantive rules announced in judicial decisions is inappropriate (1) if the decision established a new rule of law by deciding an issue of first impression in a way not "clearly foreshadowed" by earlier decision, (2) if retroactive application of the rule would not further its purpose, or (3) if retroactive application would impose hardship or produce inequitable results. The court of appeals properly concluded that the factors identified in *Chevron Oil* counsel against retroactive application of the Title III ruling in *Zweibon I* to the facts of this case. Similar equitable considerations justified the court's holding in *Zweibon I* that qualified immunity could be asserted as defense to statutory liability (516 F.2d at 670-673), a holding that this Court has previously declined to review in this case (see note 4, *supra*).

b. In any event, these issues need not be addressed because the court of appeals erred in *Zweibon I* when it held that petitioners had stated claims under Title III. In *Keith*,

this Court concluded, after an exhaustive review of the legislative history of Title III, that the statute "does not attempt to define or delineate the powers of the President to meet domestic threats to the national security" (407 U.S. at 322). The Court held that, in enacting Title III, Congress "simply did not legislate with respect to national security surveillances" (*id.* at 306 (footnote omitted)). As the dissenting judges noted in *Zweibon I*, the court of appeals' holding that Title III creates a damages remedy for warrantless national security surveillances is directly at odds with this Court's conclusions in *Keith*. See 516 F.2d at 693-699 (Wilkey, J., dissenting); *id.* at 706-707 (MacKinnon, J., dissenting).[12] Accordingly, we suggest, as an alternative ground to support the court of appeals' judgment, that Title III is wholly inapplicable to the national security surveillances at issue here.

---

[12]The legislative history of Title III supports this construction. The Senate Report recognized that there would be occasions where "foreign affairs and internal security" concerns might "overlap" with "domestic criminal" concerns and noted that where such overlapping occurred the surveillance would fall "outside the scope of [Title III]." S. Rep. 1097, 90th Cong., 2d Sess. 94 (1968). This Court acknowledged this fact in commenting that Congress might properly consider different standards for national security surveillances than "those already prescribed for specified crimes in Title III." *Keith*, 407 U.S. at 322. The Court noted that "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Mitchell* v. *Forsyth* (No. 84-335).

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
LARRY L. GREGG
Attorneys

SEPTEMBER 1984

DOJ-1985-09

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 71-02025

No. 82-1626

Bertram Zweibon, et al.,
Appellants

v.

John N. Mitchell individually and as Attorney General of the United States, et al.

Before: Edwards, Circuit Judge, MacKinnon, Senior Circuit Judge, and Swygert, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit

[filed Nov. 30, 1983]

ORDER

It is ORDERED, by the Court, sua sponte, that the Opinion for the Court filed by Senior Circuit Judge MacKinnon on October 21, 1983 be, and hereby is, amended as follows:

Page 11, line 9 of the text strike "*Ellsberg* v. *Mitchell*".

Further on page 11, strike the last sentence in footnote 15 reading as follows: "*See Ellsberg* v. *Mitchell, supra*, slip op. at 1 n.1 (MacKinnon, J., concurring in part and dissenting in part)."

Page 12, strike lines 1 and 2 of the text and the following in line 3: "part);".

Page 19, line 1 after footnote 17, strike the remainder of the line and all of line 2 to 6 inclusive.

Per Curiam
For the Court

s/s GEORGE A. FISHER

George A. Fisher
Clerk